IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 1640 of 1985

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GULAMFARID SAHEBNI MASJID & 4 - Appellant(s)

Versus

LAXMIBEN MOHANBHAI - Defendant(s)

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Appearance :

MR PV HATHI for Appellant(s) : 1 - 5.
None for Defendant(s) : 1,
NOTICE SERVED for Defendant(s) : 1.2.1, 1.2.2, 1.2.3, 1.2.4,1.2.5

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

Date : 24/11/2005

ORAL JUDGMENT

By this First Appeal, the appellants (original plaintiffs) in Civil Suit No.506 of 1982 in the Court of Ahmedabad City Civil Court at Ahmedabad, challenge the judgment and decree passed in the said suit on 24th June,

1984.

2. For the sake of convenience, the appellants are referred to as the plaintiffs and the respondent as the defendant.

3. Since, the respondent expired during the pendency of the appeal, heirs and legal representatives have been brought on record.

4. The appellants are represented by learned Advocate, Mr.P.V.Hathi. Whereas, the respondent though served with notice, have chosen not to contest this appeal.

5. In order that the submissions made by learned Advocate, Mr.Hathi, can be appreciated, facts of the case in brief need to be stated.

6. The plaintiff is a registered Public Trust and owns property bearing final plot No.132 of T.P. Scheme No.5 in Salatwada, Dariapur in Ward No.2. Adjoining to the said property there is final plot No.129 of the ownership of the defendant on the northern side of the plaintiffs' property. The case of the plaintiff has

been that the southern wall of the property located on final plot No.129 was a plain blind wall. However, the defendant demolished that wall and made a new construction and has erected window and Dokabari in the wall, which opens in a “naveri” (a narrow lane or gali).

7. The dispute is regarding the right of discharge of rainy water and the right of privacy. The plaintiff ultimately, prayed for removal of the window and Jalli (grill) placed by the defendant in his southern wall and to fill up the gap by masonry construction and make it a blind wall.

8. On the other hand, the case of the defendant is that the wall in which window is erected is of independent ownership of the defendant. It opens in the Naveri between the properties of the plaintiff and the defendant and is designed for air circulations and light. It is also the case of the defendant that the said right was enjoyed by the ancestry for more than about 2 years.

9.The trial Court after considering the pleadings of parties framed issues as under.

I S S U E S

I) Whether the plaintiffs prove that they are trustees and the suit property is property of registered trust ?

II) Whether the plaintiffs prove that the Southern wall of the defendant's property was a blind wall and the defendant has no right to have any door, window and Jali in the southern wall and the defendant cannot make any construction in such a way, so as to discharge rainy water in the suit property, as per the alleged facts ?

III) Whether the plaintiffs are entitled to have injunction as prayed for in paragraph No.6 (B) of the plaint ?

IV) Whether the defendant proves that there was window and / or a Jali in the old southern wall and the rainy water was discharged in the suit property, as alleged ?

V) Whether the defendant proves that he had and he has easement of necessity for light and air and for the discharge of water, as per the alleged facts ?

VI) What order and decree ?

9.1 The trail Court has given findings on the said issues as under.

A N S W E R S

I) Not pressed by the defendant. In the affirmative.

II) First part – Not pressed, but answer is in the affirmative.

Second part – the right to discharge the rainy water in the suit property, is accepted by the plaintiffs. The rights of the defendant to have door, window and Jali, in the Southern wall of the suit property, not proved by the defendant.

III) Not pressed by the plaintiffs.

IV) Not pressed by the plaintiffs – for the first part.

For the second part – the right of the defendant to have discharged of the rainy water, not disputed by the plaintiff.

V) First part – Not necessary to decide.

Second part – Does not arise.

VI) As per the order, passed below.

10.The trail Court, after considering the evidence led by the parties and the contentions raised before it,

passed the following order.

(1) “It is hereby ordered and directed that the defendant to close the 'Dokabari', fixed in the Southern wall of the property, bearing final plot No.129, by removing the said 'Dokabari' and in its place, 'pacca' construction be made and the part of the 'Dokabari' be made a blind wall. The defendant to carry out the present direction, on or before 30th November, 1984;

(2) The defendant to fix the door type fixtures, on the windows and 'Jalis', on or before 30th November, 1984. The defendant is restrained by permanent injunction from placing in new Jali, door or window in Southern wall of property bearing final plot No.129.

(3) If the defendant fails to carry out the stated directions, the plaintiff to get the same done by appointment of a Commissioner, or by any other made act, as per law and in that case, the defendant to pay the entire cost of the same.

(4) On closure of the 'Dokabari', the plaintiff to make arrangement for keeping the 'Naveri' clean, within fifteen days from the date of closure of the 'Naveri' and inform the defendant about the same.

(5) In view of the circumstances of the present case, the parties are directed to bear their own costs. Order and decree accordingly."

11.Learned Advocate, Mr.Hathi, appearing for the appellants has taken this Court through the records and proceedings, so also, the judgment thread bare. During the course of argument, he conceded that factually the Dokabari is closed by the defendant as per the decree. In other words, the decree is already executed. The main grievance of the appellants seems to be that the decree is passed mainly on concessions made by learned Advocate. This Court has given a close look to the case of the party and if the issues and findings by the trial Court are considered, virtually; the plaintiff – appellant has got decree that he had prayed for, except that the window, which was already constructed, was permitted to be continued under permission. The Dokabari is already closed. The situation has continued

for more than 20 years and there appears not any reason to disturb the decree, which is on basis of evidence and concessions made before the trail Court. The judgment was rendered in open Court (it is an oral judgment). The judgment was rendered on 29th June, 1984 and appeal seems to have preferred in 1985 after the execution. All these factors deter this Court from interfering with the judgment and decree impugned herein. There appears no substance in the appeal. The plaintiffs have virtually succeeded in the suit and, therefore, the appeal must fail. The appeal is dismissed. The judgment and decree is confirmed. There shall be no order as to costs.

(A.L.DAVE, J.)

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